Office - Supreme Court, U. S.
FILED
AUG 13 1940
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 329

COMPAGNIE GENERALE TRANSATLANTIQUE,
Petitioner,

vs.

GEORGE V. TAWES.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

Jos. M. Rault,
Benjamin W. Yancey,
Octavio Fabrega,
L. S. Carrington,
Counsel for Petitioner.

INDEX.

Subject Index.

	Page
Petition for writ of certiorari	1
Summary statement of matter involved	4
The Circuit Court of Appeals has decided an important question of Federal law which has not been but should be settled by this Court	7
Brief in support of petition	9
I. Opinion of the court below	9
II. Statement of jurisdiction	9
III. Statement of the case	10
IV. Specification of errors	10
V. Argument	12
(a) Instruction number 3 was confused, inconsistent and untenable	12
(b) By instruction number 5 the trial court charged the jury that petitioner had the burden of proving its case beyond a reasonable doubt	14
(c) The verdict was obviously contrary to the law as given to the jury by the trial court in its instruction number 1	15
(d) There was a total absence of substantial evidence on which the verdict could be based	16
(e) Conclusion	17

Index of Authorities.

Aarons v. *Levy Bros.*, 185 N. E. 62	15
Ætna Life Insurance Co. v. *Coffee*, 286 Fed. 657 (5 C. C. A.)	14
Amiral Cecille, The, 134 Fed. 673	14
Anna C. Minch, 271 Fed. 192 (2 C. C. A.)	12
Baltimore Steam Packet Co. v. *The Flushing*, 18 L. Ed. 85, 70 U. S. (3 Wall.) 164 (1865)	13

Page

Belgian King, The, 125 Fed. 869 (9 C. C. A. 1903, cert. den. 193 U. S. 669, 24 Sup. Ct. 852, 48 L. Ed. 840) 14
Bradley v. *Sullivan*, 209 Fed. 833 12
Bryan v. *Chicago, etc., Ry. Co.*, 19 N. W. 295 15
City of Camden, 292 Fed. 93 (3 C. C. A.) 12
City of Lowell, The, 152 Fed. 593 (2 C. C. A.) 14
Compagnie Generale Transatlantique v. *The Governor of the Panama Canal and the Panama Canal*, 90 F. (2d) 225 (5 C. C. A. 1937, cert. den. 58 S. C. 41, 302 U. S. 720, 82 L. Ed. 556) 2
Compagnie Generale Transatlantique v. *George W. Tawes*, 111 F. (2d) 92 9
Drumcraig, The, 133 Fed. 804 12
Edmund Moran, The, 180 Fed. 700 (2 C. C. A.) 12
Gage v. *Railroad Co.*, 14 S. W. 73 15
Grotjan v. *Rice*, 102 N. W. 551 15
Heacock v. *Baule*, 249 N. W. 437 15
Hoffman v. *Lond*, 69 N. E. 231 15
Julia Luckenbach, The, 219 Fed. 600 14
Lackawanna, The, 210 Fed. 262 (2 C. C. A.) 12
Manhattan, The, 3 Fed. Sup. 75 12
Merchant Prince, The, Prob. Div. (1892) 179 12
McBee v. *Bowman*, 14 S. W. 481 15
Olympia, The, 61 Fed. 120 12
Randall's Instructions to Juries, Vol. II, Sec. 247, pp. 479, et seq. 15
Reichert Towing Line, 251 Fed. 214 12
Umbria, The, 166 U. S. 404, 17 Sup. Ct. 610, 41 L. Ed. 687 14
Union S.S. Co. v. *N. Y. & Va. S.S. Co.*, 16 L. Ed. 699, 65 U. S. (24 How.) 307 13
10 R. C. L. 1012 15
64 C. J. 710 15

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 329

COMPAGNIE GENERALE TRANSATLANTIQUE,
Petitioner,

vs.

GEORGE V. TAWES.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of Compagnie Generale Transatlantique, a corporation organized and existing under the laws of the Republic of France, with respect shows:

A.

Summary Statement of Matter Involved.

This is an application for a writ of certiorari to review a decree of the Circuit Court of Appeals for the Fifth Circuit which affirmed a judgment of the United States District Court for the District of the Canal Zone on a jury verdict in favor of the defendant.

The cause of action arose on February 17, 1935, when petitioner's Steamship WISCONSIN, in transit through the

Panama Canal in charge of George V. Tawes, a compulsory Canal Zone pilot, was grounded allegedly through the negligence of Tawes. Damages amounting to $12,731.83 were sustained by the vessel. Originally petitioner brought suit against the Governor of the Panama Canal, the Panama Canal, and against Tawes, the pilot, to recover the damage and expense caused by Tawes' allegedly negligent stranding of the vessel. The Governor of the Panama Canal and the Panama Canal excepted to the jurisdiction, the lower court ruled in their favor, dismissing the complaint as against them, the Circuit Court of Appeals for the Fifth Circuit affirmed, *Compagnie Generale Transatlantique* v. *The Governor of the Panama Canal and the Panama Canal*, 90 F. (2d) 225, and this Court denied certiorari No. 288, October Term, 1937, 58 S. C. 41, 302 U. S. 720, 82 L. Ed. 556. The Governor of the Canal and the Canal itself being thus out of the case, the case then went back to the District Court for the Canal Zone, proceeded to trial as against the remaining defendant, Tawes, the pilot who had stranded the ship, and a jury verdict resulted exonerating him. From the judgment on this verdict the petitioner then again appealed to the Circuit Court of Appeals for the Fifth Circuit, where the judgment for the defendant, Tawes, was affirmed, 111 F. (2d) 92. Rehearing was denied (R. 103).

On February 17, 1935, the WISCONSIN was at Cristobal, at the Atlantic end of the Panama Canal, bound for the Republic of Salvador, on the Pacific side. In order to pass through the Canal, the vessel was required by the rules and regulations of the Canal to have a Panama Canal pilot on board (R. 72). Tawes was assigned by the port captain at Cristobal to pilot the vessel through the Canal (R. 63). Under the regulations of the Canal, chapter 4, rule 30, the master of the ship was specifically forbidden to give or cause to be given any order concerning the movement of the vessel without the knowledge of Tawes or against his advice (R. 13).

In making the passage through the Canal, the vessel encountered occasional patches of fog. Chapter 6, rule 58, of the rules and regulations governing navigation of the Canal provided that a vessel under way "when overtaken by thick or foggy weather, or rain so dense as to obscure the vision, shall immediately take every precaution necessary for safety, and anchor or moor at the first available place" (R. 14). In compliance with this rule, when he reached the first patch of fog, Tawes brought the vessel to a stop until the fog cleared (R. 64). After the fog there had lifted, he resumed his trip through the Canal and a few miles farther on again met fog, and again brought the vessel to a stop (R. 35, 64). When this second fog had cleared sufficiently, Tawes put the vessel under way again, met a third fog, and for the third time brought the vessel to a stop (R. 36, 65). When this third fog had cleared sufficiently, Tawes got the vessel under way again. The particular stretch of the Canal at which he was then navigating is known as San Pablo Reach, at the eastern end of which the Canal makes a turn of about 51 degrees into a portion of the Canal known as Mamei Curve. In making the turn from San Pablo Reach into Mamei Curve, Tawes knew that he was likely to encounter fog, but none the less continued the vessel on her way, and stranded her in the fog (R. 47, 65, 70, 74, 76, 78, 79).

In its complaint against Tawes to recover the damage caused to the vessel by the stranding, petitioner charged among other things (R. 4, 5) that Tawes failed to stop the vessel and anchor her when overtaken by a fog so dense that visibility was shut out, proceeding impossible, and navigation dangerous, that he had failed to reverse the engines and put the vessel astern when warned by the chief officer on the forecastle head that the vessel was headed toward land, that he carelessly, recklessly, and negligently navigated the vessel through a fog so dense that he could neither see the channel nor navigate the vessel to

conform to the channel, and that he failed to stop said vessel and anchor or moor it as required by the rules governing the navigation of the Canal.

The points on which review by this Court is sought appear in the record at pages 28, 29, and 30. The first two of these points refer to exceptions to the charge of the trial court, the third to the trial court's error in not holding that the verdict of the jury was contrary to the law as given by the court in its instruction number 1 (R. 13, *et seq.*), and, finally, the trial court's error in not holding that there was a total absence of substantial evidence on which the verdict of the jury could be based.

In instruction number 3 the trial court instructed the jury as follows (R. 15):

> "The Court instructs the jury that although it was the duty of defendant George V. Tawes, as set forth in Instruction No. 1, when overtaken by thick or foggy weather to immediately take or direct every precaution necessary for safety and anchor or moor the vessel at the first available place, yet, if you further believe from the evidence that the defendant, George V. Tawes, while exercising ordinary care and skill and all of the duties required of him by Instruction No. 1 on the steamship *Wisconsin* it was suddenly overtaken by fog so thick and dense that his visibility of navigating aids was obscured and that the defendant by the exercise of ordinary care and skill could not have anticipated this situation and condition before it happened, and if you further believe that the defendant, George V. Tawes, when confronted with this situation and condition then used ordinary care and skill for the safety of the vessel and to prevent grounding of same, but by the use of ordinary care and skill he was unable to do so and the vessel went aground, then the law is for the defendant and the jury should so find."

In the first place, this charge submitted to the jury a theory of the case based on the idea that if the jury believed that

the accident was, because of fog, unavoidable by the use of ordinary care, the pilot should be exonerated. In other words, it submitted to the jury a defense of unavoidable accident, a defense which was nowhere raised by the defendant's pleadings. The charge also was inherently and fatally inconsistent. In its first part it instructed the jury that it was the duty of Tawes, when overtaken by foggy weather, to take every precaution necessary for safety, and to anchor or moor the vessel at the first available place. The court, however, went on to add that if Tawes was suddenly overtaken by fog obscuring visibility, and if he could not have anticipated this situation, he was then only required to use ordinary care and skill to prevent the grounding. In other words, in one moment the trial court instructed the jury that Tawes had to anchor or moor the vessel at the first available place, and in the next moment charged, in effect, that confronted with the fog situation, he could proceed, using "ordinary care and skill". Further, this charge is based on a theory that there was evidence on which the jury might find that Tawes, by the exercise of ordinary care and skill, could not have anticipated that he would be overtaken by fog so thick and dense as to obscure visibility. There is absolutely no evidence in the record to support such a finding. On the contrary, the record is all one way and is to the effect that his visibility had been shut out on three prior occasions that same morning to such an extent that he had had to stop the vessel each time. Finally, the charge stated that if when confronted with the fog Tawes used ordinary care and skill, he was not liable. This is a most serious understatement of the pilot's duty. It was the pilot's duty to use the extraordinary care required by the extraordinary circumstances.

In instruction number 5 the court charged (R. 17):

> "The burden of proof in this case is upon the plaintiff, and unless you are reasonably satisfied by a pre-

> ponderance of the evidence that the plaintiff is entitled to recover, you should find for the defendant. If, after considering all the evidence, your minds are left in a state of reasonable uncertainty as to whether or not plaintiff is entitled to recover, your verdict should be for the defendant."

No doctrine of law is more clearly or firmly established than the rule that in civil cases the issues of fact are to be determined in accordance with the preponderance of the evidence. Proof beyond a doubt or "beyond a reasonable uncertainty" is not necessary in a civil action, and the charge in question placed upon the petitioner a burden which it did not and clearly could not have.

On motion for a new trial (R. 25) the petitioner urged that the verdict was obviously contrary to the law as given by the court to the jury in its instruction number 1 (R. 13). The undisputed fact situation disclosed by the evidence exactly fitted this charge, but in the face of the uncontroverted evidence that Tawes failed to anchor the vessel, that he proceeded in the fog at the rate of 6 knots or better without the vaguest idea where the vessel was, that he grounded the vessel not on any unknown or obscure obstruction but on the bank of the Canal, the jury found for Tawes. The verdict, rendered as it was in obvious disregard of the law as given by the trial court in this charge, should have been set aside. Finally, petitioner on the trial moved for a new trial on the ground that the evidence was insufficient to support the verdict in that there was a lack of substantial evidence on which the verdict could be based. The only evidence adduced on behalf of Tawes was that of Tawes himself. He testified that although he had been encountering fog off and on all morning, that although he had been forced to stop on three occasions on account of fog, and although he had been navigating in patches of fog in San Pablo Reach, he did not

stop to get his bearings before making the turn into Mamei Curve (R. 74). His supposed exculpatory evidence does not exculpate him; yet in disregard of these undisputed facts the jury exonerated Tawes. Its verdict clearly has no evidence to support it and should not have been allowed to stand.

B.

The Circuit Court of Appeals Has Decided Important Questions of Federal Law Which Have Not Been but Should Be Settled by This Court.

This case involves the question of the extent of the pilot's liability for damage to the vessel which he is piloting. The questions involved here have never been directly passed upon by this Court. It is respectfully submitted that this court should pass upon the duties of the pilot to the vessel in the circumstances shown by the facts of this case. This Court should pass upon the question of whether or not the pilot, in fog, is required to use only "ordinary care and skill" as set forth in the trial court's charge or whether he is required to use the extraordinary care required by the extraordinary circumstances. This Court should also pass upon the confusing and prejudicial instruction given by the trial court that petitioner was required to convince the jurors beyond a reasonable uncertainty, a burden not required by any known form of civil practice. Finally, an examination of the evidence should be made by this court. We submit that it would disclose the verdict to have been obviously contrary to instruction number 1 as given by the trial court and wholly unsupported by any substantial evidence.

Wherefore your petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Fifth Circuit, commanding that court to certify and to send to

this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings numbered and entitled on its docket, No. 9080, Compagnie Generale Transatlantique, Appellant *v.* George V. Tawes, Appellee; and that the said judgment of the Circuit Court of Appeals for the Fifth Circuit may be reversed by this Honorable Court; and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem proper and just.

Respectfully,

COMPAGNIE GENERALE TRANSATLANTIQUE,
By JOS. M. RAULT,
BENJAMIN W. YANCEY,
OCTAVIO FABREGA,
L. S. CARRINGTON,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 329

COMPAGNIE GENERALE TRANSATLANTIQUE,
Petitioner,

vs.

GEORGE V. TAWES.

BRIEF IN SUPPORT OF PETITION.

I.

Opinion of the Court Below.

The opinion of the Circuit Court of Appeals for the Fifth Circuit is to be found reported in 111 F. (2d) 92.

II.

Statement of Jurisdiction.

The statute on which the jurisdiction of this Court is predicated is Section 240 (a) of the Judicial Code as amended (U. S. C. Title 28, Section 347), in which it is provided that in any case, civil or criminal, in a circuit court of appeals, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto,

to require by certiorari, either before or after the judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.

III.

Statement of the Case.

A full statement of the case has already been given under the heading A in the petition for writ of certiorari, and in the interest of brevity need not be repeated at this point.

IV.

Specification of Errors.

The Circuit Court of Appeals erred in the following particulars:

1.

In not holding that instruction number 3 of the trial court submitted to the jury the defense of inevitable accident, an affirmative defense which had to be alleged and proved, and not having been alleged and proved, it should not have been submitted to the jury.

2.

In not holding that instruction number 3 to the jury was inherently inconsistent and intended to confuse the jury, in that in one portion of the charge the trial court advised the jury that it was respondent's duty, when overtaken by foggy weather, immediately to take every precaution for safety and to anchor or moor the vessel at the first available place; whereas in another part of the charge the trial court told the jury that if the respondent was suddenly overtaken by fog obscuring visibility, he was then required only to use ordinary care and skill to prevent the grounding.

3.

In not holding that the rules governing the navigation of the Canal are clear and unambiguous, that they require the anchoring of a vessel at the first available place upon the approach of fog, that they cannot be interpreted to allow a pilot to navigate a vessel in a fog, using, as instruction number 3 of the trial court put it, only "ordinary care and skill".

4.

In not holding that there was no evidence in the record to justify the court's intimation in its instruction number 3 that the respondent, by the exercise of ordinary care and skill, could not have noticed his visibility being shut out by dense fog.

5.

In not holding that the trial court by its instruction number 3 to the jury seriously understated the pilot's duty by stating that he was not liable if, when confronted by fog, he then used "ordinary care and skill"; the pilot's duty under such circumstances being to proceed with unusual caution, utmost precaution, and extraordinary care.

6.

In not holding that by its instruction number 5 to the jury the lower court, even considering the charge as a whole, erroneously instructed the jury that it must be convinced beyond a reasonable doubt of petitioner's right to recover.

7.

In not holding the verdict to have been obviously contrary to the law as given by the trial court in its instruction number 1.

8.

In not holding that there was a total absence of substantial evidence on which the verdict could have been decided.

9.

In not holding that the verdict was contrary to the undisputed evidence.

10.

In not maintaining petitioner's four assignments of error and in not reversing the judgment of the lower court.

V.

ARGUMENT.

(a) Instruction Number 3 Was Confused, Inconsistent, and Untenable.

Instruction number 3 submitted to the jury a theory of the case based on the idea that the jury might exonerate the pilot if it believed that the accident was because of the fog, unavoidable by the use of ordinary care. The presumption of negligence arising out of the grounding of the vessel on the banks of the Canal in a well known and well marked channel requires strong exculpation. This charge to the effect that if the accident was unavoidable by the use of ordinary care submitted to the jury a defense of inevitable accident. Inevitable accident, however, is an affirmative defense which must be alleged and proved. See *The Merchant Prince, Prob. Div.* (1892) 179; *The Edmund Moran,* 180 Fed. 700 (2 C. C. A. 1910); *Bradley* v. *Sullivan,* 209 Fed. 833; *The Olympia,* 61 Fed. 120; *The Lackawanna,* 210 Fed. 262 (2 C. C. A. 1913); *Reichert Towing Line,* 251 Fed. 214; *Anna C. Minch,* 271 Fed. 192 (2 C. C. A. 1921); *The Drumcraig,* 133 Fed. 804 (N. D. Cal. 1904); *City of Camden,* 292 Fed. 93 (3 C. C. A. 1923); *The Manhattan,* 3 Fed. Sup. 75

(E. D. Pa. 1932); *Union SS Co.* v. *N. Y. & Va. SS Co.*, 16 L. Ed. 699, 65 U. S. (24 How.) 307 (1860); *Baltimore Steam Packet Co.* v. *The Flushing*, 18 L. Ed. 85, 70 U. S. (3 Wall.) 164 (1865). In this case there was no pleading of any affirmative defense; specifically there was no pleading of inevitable accident. Under these circumstances this charge placed upon the jury an issue wholly unrelated to the case.

The charge, however, was fatally inconsistent, in that in its first portion it instructed the jury that it was the duty of Tawes, when overtaken by foggy weather, immediately to take every precaution for safety, and to anchor or moor the vessel at the first available place. By the same charge, however, in the face of the unequivocal rule of the Canal requiring anchoring at the first available place, the court in effect advised the jury that the pilot could proceed so long as he used "ordinary care and skill". So, too, the charge is predicated on a fact situation not disclosed by any evidence in the record. It is based on some theory that Tawes could not have anticipated that he would be overtaken by fog. The Court will note that the record is all one way on this point and is to the effect that his visibility had been shut out on three prior occasions that same morning to the extent that he had to stop the ship each time. He knew that he was likely to run into fog in making the very turn on which he grounded (R. 65). In this situation the court should not under any circumstances have suggested to the jury that Tawes might not have anticipated his visibility being obscured. There was no justification for such a suggestion.

The final and most important point about this charge, however, is the court's statement that if, when confronted with the fog, Tawes then used "ordinary care and skill", he was not liable. This is not a correct statement of his duty. On the contrary, it was his duty to use the extraordinary care required by the extraordinary circumstances. With the knowledge that he had been running

through fog all morning and finding himself in the fog again at the turn into Mamei Curve, it was not sufficient that he use only "ordinary care and skill". Confronted with extraordinary circumstances he was required to take the extraordinary precautions called for by the situation in which he found himself. The rule is that a vessel in a dense fog is bound to observe "unusual caution", *The Belgian King,* 125 Fed. 869, at 876 (9 C. C. A. 1903, cert. den. 193 U. S. 669, 24 S. Ct. 852, 48 L. Ed. 840); is bound to navigate "with the degree of extraordinary care and precision which the peculiar conditions then existing made necessary", *The Amiral Cecille,* 134 Fed. 673, at 676 (W. D. Wash. 1905); that "in thus proceeding the utmost precautions" are necessary, *The City of Lowell,* 152 Fed. 593, at 594 (2 C. C. A. 1907). These precautions must be taken not only when the vessel is herself enveloped in fog, but also when she is approaching a bank or patches of fog, *The Julia Luckenbach,* 219 Fed. 600 (E. D. Va. 1914). For a full review of the American and English cases on the subject of the "extraordinary care" and "utmost precaution" required in a fog, see *The Umbria,* 166 U. S. 404, 17 S. Ct. 610, 41 L. Ed. 687.

When the trial court, in the case at bar, charged that Tawes, confronted with the fog, was required to use "ordinary care and skill" it seriously understated the duty imposed by law upon the pilot. The failure to charge that Tawes' duty was to use the "extraordinary care" and "utmost precaution" required by the extraordinary circumstances was prejudicial error.

(b) By Instruction Number 5 the Trial Court Charged the Jury That Petitioner Had the Burden of Proving Its Case Beyond a Reasonable Doubt.

That the plaintiff in a civil case is not required to prove its case beyond a reasonable doubt is a legal truism. *Aetna Life Insurance Company* v. *Coffee,* 286 Fed. 657 (5 C. C. A.);

Gage v. *Railroad Co.*, 14 S. W. 73 (Tenn.); *McBee* v. *Bowman*, 14 S. W. 481 (Tenn.). See, also, 10 R. C. L. 1012; 64 C. J. 710; *Bryan* v. *Chicago, etc., Ry. Co.*, 19 N. W. 295 (Iowa); *Heacock* v. *Baule*, 249 N. W. 437 (Iowa); *Hoffman* v. *Lond*, 69 N. E. 231 (Mich.); *Aarons* v. *Levy Bros.*, 185 N. E. 62 (Ohio); *Grotjan* v. *Rice*, 102 N. W. 551; *Randall's Instructions to Juries* (1922), Vol. II, Sec. 247, pp. 479, *et seq.* The charge in question clearly placed on the petitioner the burden of satisfying the jury beyond a reasonable doubt. The Circuit Court of Appeals admits that this instruction does not accurately state the burden which the plaintiff was required to bear (R. 97). The Circuit Court of Appeals, however, was of the opinion that taking the charge as a whole, it was not erroneous (R. 97). The damaging and inaccurate statement cannot be cured by the confused language of the trial court in the remainder of the charge.

(c) The Verdict Was Obviously Contrary to the Law as Given to the Jury by the Trial Court in Its Instruction Number 1.

Instruction Number 1 appears at pages 13, 14, and 15 of the record. According to this instruction, it was Tawes' duty, while the vessel was under way in the Canal and was overtaken by thick weather so dense as to obscure vision, immediately to direct and to take every precaution necessary for safety, and to *anchor or moor* the vessel at the first available place. The trial court amplified by adding that, if the jury believed that the vessel was overtaken by thick weather so that his version of navigating aids was obscured, and that he negligently failed to stop the vessel, or negligently failed to take all necessary precautions for the ship's safety, but negligently allowed the ship to proceed until he was advised that there was land ahead and it was then too late to steer the ship back into the channel and to avoid grounding her, and as a direct and proximate result

of such negligence, if any, the vessel went aground, then the law was for the plaintiff and the jury should so find.

The record will disclose that the vessel had been navigating in and out of the fog all morning (R. 35, 36, 43, 53, 64, 65, 67). On three different occasions Tawes had obeyed the navigation rules and had brought the vessel to a stop (R. 64, 65). There is no substantial, credible evidence explaining why the same procedure could not have been adopted when this fourth and final fog was encountered. Immediately prior to encountering the dense fog in which he grounded, he had been running through patches of fog (R. 65); he knew before he reached the turn that he was likely to encounter dense fog around it (R. 65). With this knowledge and with his experience of intermittent fog throughout the morning, his only precaution was to cut the vessel's speed from seven knots to six (R. 65) and to keep on his way. Disregarding the mandatory rule to anchor at the first available place, Tawes proceeded under way in the fog without any exact knowledge of where he was. The evidence on that point is uncontradicted (R. 74). The verdict rendered as it was in obvious disregard of instruction Number 1 should have been set aside.

(d) There Was a Total Absence of Substantial Evidence on Which the Verdict Could be Based.

The only evidence adduced on the trial on behalf of the pilot was that of Tawes himself. His testimony, appearing at pages 63 *et seq.* of the record, is absolutely devoid of any grounds of exculpation. The whole picture presented is one of confusion. Although he had been encountering fog off and on all morning, although he had been forced to stop on three occasions by fog, and although he had been navigating through patches of fog just prior to making the turn on which he grounded, he did not stop to get his bear-

ings before beginning to negotiate the turn (R. 74). The record may be scrutinized with the greatest of care without finding a single solitary reason why Tawes could not and did not bring the vessel to a stop to wait out the fog at this point as he had done on three prior occasions. In the total absence of substantial evidence to support it, the verdict should have been set aside, and the failure of the trial court to set it aside, and of the Circuit Court of Appeals to reverse, should be reviewed by this Court.

(e) Conclusion.

This Court has not at any time passed squarely upon the duties and liabilities of the pilot to his vessel. This we think is an extremely important question of maritime law which should be examined, passed upon, and settled by this Court. The law should not be left in the confused, contradictory, and inconsistent shape in which the charges of the trial court in the instant case have left it. Here we have a pilot grounding a vessel in well known and well marked waters; a pilot navigating in a fog without any exact knowledge of where he is; a pilot failing to obey the specific rules and regulations of the Panama Canal requiring his anchoring the vessel in foggy weather; a pilot failing to take the ordinary precautions of getting his bearings, although there was no reason why he could not do so, and although he had done so on at least three prior occasions; all in spite of the fact that he had brought the vessel to a stop on account of fog on no less than three prior occasions; in spite of the fact that fogs are admittedly common in that vicinity at that time of the year; and in spite of the most persuasive fact that the vessel had been encountering dense fog and patches of fog throughout this particular trip. In the face of this situation, wholly uncontradicted by any evidence in the record, a jury proceeded to

clear the pilot. It is submitted that the case is preeminently one for the exercise of this Court's supervisory jurisdiction in order that the duties and liabilities of the pilot to his vessel be passed upon by this Court.

Respectfully,

COMPAGNIE GENERALE TRANSATLANTIQUE,
By JOS. M. RAULT,
BENJAMIN W. YANCEY,
OCTAVIO FABREGA,
L. S. CARRINGTON,
Counsel for Petitioner.

(9289)

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	5
Conclusion	8

CITATIONS

Cases:	
Baten v. *Kirby Lumber Corp.*, 103 F. (2d) 272	7
City of Lowell, The, 152 Fed. 593	5
Compagnie Generale Transatlantique v. *The Governor of the Panama Canal and the Panama Canal*, 90 F. (2d) 225, *certiorari denied*, 302 U. S. 720	3
Danzansky v. *Zimbolist*, 105 F. (2d) 457	6
Ellerd v. *Griffith*, 29 F. (2d) 402	7
Guerini Stone Co. v. *Carlin Construction Co.*, 248 U. S. 334	7
Hansen v. *Boyd*, 161 U. S. 397	7
Hartford Life Annuity Ins. Co. v. *Unsell*, 144 U. S. 439	7
Mason v. *Ervine*, 27 Fed. 459	5
State Life Insurance Co. v. *Sullivan*, 58 F. (2d) 741	7
United States v. *United States Fidelity Co.*, 236 U. S. 512	7
Wilson v. *Pilots' Assn.*, 57 Fed. 227	5

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 329

COMPAGNIE GENERALE TRANSATLANTIQUE,
PETITIONER

v.

GEORGE V. TAWES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals for the Fifth Circuit (R. 93–98) is reported in 111 F. (2d) 92.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 12, 1940 (R. 98). A petition for rehearing (R. 99–102) was denied on July 8, 1940 (R. 103). The petition for a writ of cer-

tiorari was filed August 13, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

A steamship, while passing through the Panama Canal, went aground allegedly as a consequence of the negligence of its compulsory pilot. This is an action by the vessel owner against the pilot.

The questions are:

1. Whether the District Court correctly charged the jury as to the degree of care which the pilot should have exercised.
2. Whether the District Court correctly charged the jury as to the burden of proof.
3. Whether there was any evidence to support the verdict of the jury.

STATEMENT

Petitioner commenced this action in the United States District Court for the District of the Canal Zone, Division of Balboa, against the respondent Tawes, a compulsory pilot, to recover damages for injuries to the steamer *Wisconsin* incurred when it stranded while passing through the Panama Canal.[1]

---

[1] Originally, suit had been brought against the Governor of the Panama Canal, the Panama Canal, and Tawes. The complaint was dismissed as to the Governor of the Panama Canal and the Panama Canal on the question of jurisdiction;

In its amended complaint (R. 2–6), petitioner alleged, *inter alia,* that on February 17, 1935, the steamer *Wisconsin,* owned and operated by it, was in the harbor of Cristobal, awaiting transit through the Panama Canal; that a vessel was forbidden to transit the canal without a Panama Canal pilot aboard; that respondent, as such pilot, boarded the steamer and took charge of the navigation through the canal; that thereafter the master of the vessel was prohibited from issuing any orders concerning the operation or navigation of the ship, unless directed or advised to do so by the compulsory pilot; and that "said pilot carelessly, negligently and unskillfully operated, managed and navigated said vessel *Wisconsin* as to cause it to run aground on the bank of the Canal and stick on said bank, thereby causing the hereinafter mentioned damages to said vessel and the plaintiff herein" (R. 4). The complaint specified five distinct acts of negligence on the part of respondent (R. 4–5) and concluded with a prayer for damages (R. 5–6). The answer of respondent (R. 6–9) admitted that the *Wisconsin* was in Cristobal on the date named, but denied all other allegations in the complaint.

The case was submitted to a jury for determina-

---

the Circuit Court of Appeals for the Fifth Circuit affirmed the dismissal, *Compagnie Generale Transatlantique* v. *The Governor of the Panama Canal and the Panama Canal,* 90 F. (2d) 225. This Court denied certiorari, 302 U. S. 720, whereupon the case was sent to the District Court for trial, with Tawes as sole defendant.

tion on all the evidence (R. 35–81) under instructions by the district court (R. 10–20). The jury brought in a verdict for the respondent (R. 20), and judgment in conformity with the verdict was entered (R. 22). A motion by respondent for a new trial (R. 23–25) was dismissed (R. 26).

Petitioner's only pertinent claims of error, during the course of the trial, were two general objections, made without pointing out any specific defects, to Instructions 3 and 5 (R. 22, 24, 82).[2] It

---

[2] Instruction 3 reads (R. 15–16):

"The Court instructs the jury that although it was the duty of defendant George V. Tawes, as set forth in Instruction No. '1,' when overtaken by thick or foggy weather to immediately take or direct every precaution necessary for safety and anchor or moor the vessel at the first available place, yet, if you further believe from the evidence that the defendant, George V. Tawes, while exercising ordinary care and skill and all of the duties required of him by Instruction No. '1' on the steamship *Wisconsin* it was suddenly overtaken by fog so thick and dence that his visibility of navigating aids was obscured and that the defendant by the exercise of ordinary care and skill could not have anticipated this situation and condition before it happened, and if you further believe that the defendant, George V. Tawes, when confronted with this situation and condition then used ordinary care and skill for the safety of the vessel and to prevent grounding of same, but by the use of ordinary care and skill he was unable to do so and the vessel went aground, then the law is for the defendant and the jury should so find."

Instruction 5 reads (R. 17):

"The burden of proof in this case is upon the plaintiff, and unless you are reasonably satisfied by a preponderance of the evidence that the plaintiff is entitled to recover, you should find for the defendant. If, after considering all the evi-

made no motion for a directed verdict or for judgment notwithstanding the verdict.

On appeal, the Circuit Court of Appeals for the Fifth Circuit affirmed the judgment entered by the District Court (R. 93–98).

ARGUMENT

1. Petitioner's contention (Pet. 4–5) that Instruction 3, among the several dealing with the standard of care, was so erroneous and misleading as to vitiate the verdict of the jury is without substance. The instructions as a whole (Nos. 1, 3, and 4), while stating that the pilot was required to exercise "ordinary care," expressly declared that respondent was required "to immediately direct and take every precaution necessary for safety" when overtaken by fog (R. 14, 15) and defined "ordinary care" to mean the care which ordinarily prudent pilots would exercise in the circumstances of this case (R. 16). No decision imposes a higher standard. Compare *The City of Lowell,* 152 Fed. 593, 594 (C. C. A. 2d); *Wilson* v. *Pilots' Assn.,* 57 Fed. 227, 231 (E. D. S. C.); *Mason* v. *Ervine,* 27 Fed. 459 (C. C. E. D. La.). The language of Instruction 3 itself, as the court below observed (R. 97), is neither inconsistent nor calculated to

---

dence, your minds are left in a state of reasonable uncertainty as to whether or not plaintiff is entitled to recover, your verdict should be for the defendant."

confuse the jury;[3] the instructions viewed as a whole are plainly correct.

2. The contention (Pet. 5–6) that Instruction 5 required the petitioner to prove his case beyond a reasonable doubt is equally lacking in merit. The first sentence of Instruction 5 adequately stated the "preponderance of the evidence" rule, and Instruction 6 (R. 17–18) dealt at length with the meaning of "preponderance of the evidence." The instruction as a whole, as the court below held (R. 97), could not have misled the jury. See *Danzansky* v. *Zimbolist,* 105 F. (2d) 457 (App. D. C.).

3. A careful review of the evidence persuaded the court below to conclude that the "jury could reasonably approve his [respondent's] conduct as not negligent" (R. 95–96). The soundness of its conclusion is evident on the face of the record.[4]

---

[3] The petitioner further contends that Instruction 3 was erroneous in that it (a) submitted to the jury the defense of inevitable accident, which was not pleaded, and (b) was based on the assumption that respondent could not have anticipated the fog, which assumption is not supported by the evidence (Pet. 12–13). The respondent's answer denying negligence, however, was sufficient to permit the defense (R. 97), and there was evidence that visibilty was shut out in five seconds (R. 69).

[4] The evidence to support the conclusion is, in short, as follows: There was evidence from which the jury could have concluded that the three fogs, encountered prior to the accident, were discernible in sufficient time to enable the pilot to stop the vessel without damage (R. 64–65, 73) but that the fog encountered immediately preceding the accident came on so suddenly that respondent could not have an-

4. Moreover, in any event, there are sufficient independent grounds to support the verdict and judgment. In the first place, petitioner's objections to Instructions 3 and 5 were too general to provide the District Court with an opportunity to correct the alleged errors. *Guerini Stone Co.* v. *Carlin Construction Co.*, 248 U. S. 334, 348; *United States* v. *United States Fidelity Co.*, 236 U. S. 512, 529; *State Life Ins. Co.* v. *Sullivan*, 58 F. (2d) 741, 744 (C. C. A. 9th). Secondly, the sufficiency of the evidence to support the verdict was not questioned either by a motion for a directed verdict or for judgment notwithstanding the verdict. *Hansen* v. *Boyd*, 161 U. S. 397, 402; *Hartford Life Annuity Insurance Co.* v. *Unsell*, 144 U. S. 439, 450–451; *Baten* v. *Kirby Lumber Corp.*, 103 F. (2d) 272, 273 (C. C. A. 5th); *Ellerd* v. *Griffith*, 29 F. (2d) 402, 403 (C. C. A. 5th). In these circumstances, as the cited cases hold, the objections cannot be pressed upon appeal.

5. Finally, no question of either substantial or general importance is involved. The rules concerning the burden of proof and a pilot's duty of care in a fog are not in dispute. No conflict is urged in the petition. The only issues are whether the particular instructions, under the circum-

---

chored the ship without endangering the vessel (R. 68, 69, 73). There was also evidence that, immediately prior to the accident, the vessel's speed was slowed as a precautionary measure and that, after the fog came on, the pilot exercised every precaution (R. 66, 70, 72, 73, 75–76).

stances of this case, sufficiently comply with accepted standards and whether there is any evidence to sustain the judgment.

CONCLUSION

For the foregoing reasons, we respectfully submit, the petition for a writ of certiorari should be denied.

FRANCIS BIDDLE,
Solicitor General.
FRANCIS M. SHEA,
Assistant Attorney General.
PAUL A. SWEENEY,
Special Assistant to the Attorney General.
ELLIS LYONS,
EDWIN E. HUDDLESON, Jr.,
Attorneys.

SEPTEMBER 1940.

U. S. GOVERNMENT PRINTING OFFICE: 1940